The Measure of Damages for Defamation

Charles T. McCormick

THE MEASURE OF DAMAGES FOR DEFAMATION*

CHARLES T. MCCORMICK**

(1) *The requirement of "special damages."*

In claims for defamation of character by uttering or publishing of false charges, the ascertainment of the amount of the recovery is peculiarly important, since in those cases the absence of any money-measure greatly widens the range of possible awards. At the outset the damage-element is thrust into the foreground by an unusual requirement. This is the requirement that in order to recover for an ordinary *slander*—oral defamation—the plaintiff must plead definitely and prove, that publishing the accusation has caused him specific material harm, or "special damages," as it is called.[1] An important qualification is that where the defamation comes within certain traditional classes of false charges of particular gravity, that is, accusations of serious crime, or loathsome disease, or charges tending to discredit one in his calling, business or profession, or (by statute[2]) imputations of unchastity in women—in such cases no pleading or proof of identified injury is required. Such slanders are said to be actionable "per se." Likewise all libels, or *written* charges, which are defamatory at all, that is, of a kind calculated, if believed, to detract in a substantial way, from the esteem in which the person is held in the community, are under the traditional common-law view actionable

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[1] Marion v. Davis, 217 Ala. 16, 114 So. 357 (1927) (charge against young married man that he had solicited a woman to have intercourse); Shields v. Booles, 238 Ky. 673, 38 S. W. (2d) 677(7) (1931) (statement by rival candidate for legislature that plaintiff had voted against repeal of pari-mutuel law); Craig v. Proctor, 229 Mass. 339, 118 N. E. 647 (1918) (statement that a man other than her husband buys gowns for plaintiff); W. T. Farley, Inc. v. Bufkin, 159 Miss. 350, 132 So. 86 (1931) (statement by collector, "You are . . . crooks and . . . not ladies"); Jones v. Jones [1916] 2 App. Cas. 481, Ann. Cas. 1917A, 1032 (charge against school-teacher that he had committed adultery); DECENNIAL & CURRENT DIGESTS, *Libel and Slander*, §§11-12.

[2] Such statutes are now common, e.g. the Slander of Women Act, (1891) 54 and 55 VICT. c. 51; N. Y., LAWS 1871, c. 219; MICH. COMP. LAWS (1929) §14470; N. C. CODE ANN. (Michie, 1931) §2432. See NEWELL, SLANDER AND LIBEL (4th ed. 1924) §125, where the decisions and statutes are collected. He lists the following states as having such laws: Alabama, California, Illinois, Indiana, Maryland, Michigan, Missouri, North Carolina, South Carolina, Tennessee, and New York.

without pleading or proving "special damage."[3] It has been supposed that the motive behind the requirement of showing "special damage" is to weight the scales against those who bear false witness by charges of grave import, and against those who deliberately put down on paper a lasting memorial of *any* lie against a neighbor's good name,—and on the other hand to place some handicap upon actions for oral detractions of the more trivial sort.[4]

This explanation is in truth a mere rationalization of rules which have their roots in history, not in reason. The classification of slanderous charges into those actionable "per se" and those actionable only on proof of "special damage" is a line of division which corresponded, at one stage, to the line between cases which could be brought in the King's Courts and those where a remedy could be sought only in the ecclesiastical tribunals where the defamer could be called to account "for the good of his soul." Not until a much later stage, when the spread of education and the introduction of printing had brought importance to the written word, was a separate body of doctrine worked out for libel, an innovation imported from Roman practice by the Star Chamber.[5]

The terminology, "actionable per se" has proven treacherous, in that it has invited confusion with another doctrine which obtains in defamation cases. This is the doctrine which distinguishes between words (such as, "You are a thief") which convey a defamatory

[3] Axton Fisher Tobacco Co. v. Evening Post Co., 169 Ky. 64, 183 S. W. 269(4) (1916); Craig v. Proctor, 229 Mass. 339, 118 N. E. 647 (1918); Byram v. Aiken, 65 Minn. 87, 67 N. W. 807 (1896); Hodges v. Cunningham, 161 Miss. 395, 135 So. 215 (1931) ("At common law, any written or printed language which tends to injure one's reputation, and thereby expose him to public hatred, contempt, or ridicule, degrade him in society, lessen him in public esteem, or lower him in the confidence of the community, is actionable per se."); NEWELL, SLANDER AND LIBEL (4th ed. 1924) §745; ODGERS, LIBEL AND SLANDER (5th ed. 1911) 377; SPENCER BOWER, ACTIONABLE DEFAMATION (2d ed. 1923) 22.

[4] See the discussion in Rice v. Simmons, 2 Harr. 417, 31 Am. Dec. 766 (Del. 1838) and Byram v. Aiken, 65 Minn. 87, 67 N. W. 807, 808 (1896).

[5] Van Vechten Veeder, "The History of the Law of Defamation," SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909) vol. 3, p. 446; Haldane, L. Ch., in Jones v. Jones [1916] 2 App. Cas. 481, 489, Ann. Cas. 1917A, 1032; E. JENKS, SHORT HISTORY OF ENGLISH LAW (3d ed. 1924) 146; SPENCER BOWER, ACTIONABLE DEFAMATION (2d ed. 1923) 282; T. F. T. Plucknett, (1933) 9 ENC. SOC. SC. 431. The last writer argues with entire persuasiveness that the law of defamation should be modernized by abandoning the distinction between libel and slander and discarding the special treatment of the classes of slanders actionable "per se." Louisiana, with its civil law inheritance, rejects the requirement of proof of special damage, and the distinctions between libel and slander. Tarlton v. Lagarde, 46 La. Ann. 1368, 16 So. 180 (1894).

meaning on their face, and on the other hand, words of veiled detraction whose offense is apparent only when the context and circumstances are revealed. The former are sometimes said to be defamatory "per se," or slanderous "per se" or libelous "per se," whereas the latter to be properly pleaded must have an accompanying "innuendo," or explanation.[6] Clearly, this requirement has no relationship to the other rule, that certain slanders are and others are not, actionable without a showing of special damage, but the use of the phrase "per se" in both connections has produced confusion, and we find many American courts adopting the practice of requiring in cases where the defamation, whether slander or libel, must be explained by an "innuendo" to reveal its defamatory meaning, that special damages be also pleaded.[7] This is foreign to the common law

[6] See, for cases illustrating the distinction, Bowie v. Evening News, 148 Md. 569, 129 Atl. 797 (1925); Woolston v. Montana Free Press, 90 Mont. 299, 2 P. (2d) 1020 (1931); DEC. & CURR. DIG., *Libel and Slander*, §86 (2).

Sometimes also the term "libelous per se" seems to be used to denote written defamations which are of such purport (e.g. charges of crime, disease, etc.) that if oral, they would be "actionable per se."

[7] Shaw Cleaners & Dyers, Inc. v. Des Moines Dress Club, 245 N. W. 231 (Ia. 1932) (advertisement by rival dry cleaners that garments cleaned at half price are only "half-way" cleaned, held not "actionable per se," under the Iowa statute [Iowa Code (1931) §§ 12412, 13256] and hence special damages must be averred; but this case is properly to be classified as one of trade-disparagement, rather than defamation), see *infra* note 8; Jerald v. Houston, 124 Kan. 657, 261 Pac. 851 (1927) (newspaper article stating that plaintiff had secured excessive verdict in railroad condemnation case not actionable without proving special damage where the article did not on its face without explanation expose plaintiff to public contempt; interesting opinion by Burch, J.); Taylor v. Mosely, 170 Ky. 592, 186 S. W. 634 (1916) (written statement that plaintiff, a candidate for nomination as County Clerk, had stated that he was tired of pandering to the Catholics and that he could get their votes by a small contribution, held not libelous per se and since no recoverable special damages were alleged, there was no cause of action); Bowie v. Evening News, 148 Md. 569, 129 A. 797(3) (1925) (newspaper statement intimating that sheriff connived at tampering with witness in liquor prosecution, held not to require allegation of special damage since no "innuendo" necessary); Gates v. New York Recorder Co., 155 N. Y. 228, 49 N. E. 769 (1898) (question of sufficiency of complaint in action for libel for stating that plaintiff was "said to have been a concert-hall singer and dancer at Coney Island," is made to turn on question of whether the matter was libelous per se and hence dispensed with need of pleading special damage); Wimmer v. Oklahoma Pub. Co., 151 Okl. 123, 1 P. (2d) 671 (1931) (statement that plaintiff, mayor, was "hooted out of a public meeting," not libelous per se, and complaint not alleging special damage, demurrable). For other examples, see DEC. & CURR. DIG., *Libel and Slander*, §§89 (1), 100 (2).

A recent New York case seems to leave the position of the court in doubt. In Sydney v. MacFadden Newspaper Pub. Corp., 242 N. Y. 208, 151 N. E. 209 (1926) the court, though professing to recognize a requirement that a libel not defamatory "per se" requires an allegation of special damage, held nevertheless that to publish of a lady that she was "Fatty Arbuckle's latest lady-

tradition,[8] and adds an additional complexity to a subject already overburdened with rules which are holding over long after the judicial rivalries which produced them have been forgotten.[9] Perhaps the survival of the old distinctions and the invention of this new one, may be due to the fact that these rules enable the judge more easily to control the results in defamation cases, by a decision on the pleadings or on the sufficiency of the proof, where the explosive emotional possibilities may make it undesirable to leave the outcome to a jury.

In another group of cases, distinct from libel but closely similar, the requirement that material damage be established has long been insisted on. These are the cases of communications which reflect upon the products or services furnished by plaintiff in his business. Liability here hinges upon the actual infliction of ascertainable pecuniary loss, but the ancestry of this doctrine is traceable in a line distinct from the libel cases where the plaintiff's character is defamed. "Such an action is not one of libel or slander, but an action on the case for damage willfully and intentionally done. . . ."[10] It is probable that the damage-requirement in these cases of disparagement of goods has contributed to the confusion which facilitated the development of the American doctrine of requiring "special damage" in cases of covert libel.[11] In *Erick Bowman Remedy Co. v. Jensen Salsberry Laboratories,*[12] the plaintiff, a corporation, complained of a statement issued by the defendant purporting to give an analysis of an abortion remedy for live stock, sold by plaintiff, with the comment, "which only goes to prove that P. T. Barnum's statement fifty years ago can be applied even at the present time." The complaint alleged,

love" was libelous per se, though its defamatory character could only be revealed by alleging the fact that plaintiff was a married woman. See comment, 25 MICH. L. REV. 551.

[8] *Supra* note 3.

[9] This view finds strong support in a note by N. J. Burke, *Libel per se* (1925) 14 Calif. L. Rev. 61.

A parallel manipulation of the term "libelous per se," in a sense different from its traditional meaning, to work a change in the law, is seen in Layne v. Tribune Co., 146 So. 235 (Fla. 1933) commented upon (1933) 46 Harv. L. Rev. 1032 and (1933) 81 U. Pa. L. Rev. 779 (allegation of actual malice or negligence, or of special damage, held necessary, to hold newspaper for printing Associated Press dispatch stating plaintiff indicted; such a publication, based on information thus furnished, not being "libelous per se.")

[10] Ratcliffe v. Evans, L. R. [1892] 2 Q. B. 524, as quoted in Erick Bowman Remedy Co. v. Jensen Salsberry Laboratories, 17 F (2d) 255 (C. C. A. 8th, 1926).

[11] See Burke, *Libel Per Se,* (1925) 14 Calif. L. Rev. 61, 65.

[12] *Supra* note 10. Another case of disparagement of business, inartistically disposed of by use of the "libelous per se" criterion is Shaw Cleaners and Dyers, Inc. v. Des Moines Dress Club, *supra* note 7.

generally, resulting loss of reputation, and loss of credit and profits, amounting to $100,000. The court held that the statement was not "libelous per se" and hence whether considered as an action for libel or as disparagement of goods, it failed because of lack of allegation of specific pecuniary loss.

(2) *"Special damage" requires pecuniary injury.*

What injury will satisfy this requirement of "special damages"? Here again, the mark of history is apparent, in the requirement that the injury must be a pecuniary or material one. This was evolved as a basis for classifying one group of slander cases which the law courts would withdraw to themselves from the ecclesiastical tribunals, whose jurisdiction was "spiritual."[13] The requirement[14] is often rigorously applied today, though occasionally relaxed, and affords another hurdle with which the judge can confront the dubious claim. Thus, it is not usually enough for the plaintiff to plead that the publication of the slander has humiliated or embarrassed him,[15] or has been productive of mental anguish, or even that actual sickness has been brought on.[16] Mere loss of reputation standing alone is not

[13] See historical references, *supra* note 5.

[14] For collection of cases on "special damages," DEC. & CURR. DIG., *Libel and Slander* §§89 and 118. See also 37 C. J., *Libel and Slander* §544; BOWER, ACTIONABLE DEFAMATION (2d. ed. 1923) 32-34.

[15] Harrison v. Burger, 212 Ala. 670, 103 So. 842 (1925) (allegation that due to false statement made to a credit association, plaintiff was humiliated and embarrassed, suffered mental anguish, and her credit, standing and character were damaged, insufficient); Walker v. Tucker, 220 Ky. 363, 295 S. W. 138 (1927) (allegation that defendant's slander in calling plaintiff a bastard humiliated plaintiff and caused mental strain, and forced her to leave school because she felt she was slighted by her school-mates, insufficient).

[16] Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420 (1858) (the plaintiff, a man, sues for slander in imputing incontinent conduct with a married woman, alleging that on hearing of the slander he was made ill, held insufficient, for the special damage must be such as proceeds from the loss of reputation); Shafer v. Ahalt, 48 Md. 171, 30 Am. Rep. 456 (1874); Clark v. Morrison, 80 Ore. 240, 156 P. 429 (1916) (action, after three previous voluntary non-suits, for slander in calling the plaintiff [a woman] "an obstreperous person and a mischief maker and a nuisance in the parish," with allegation that by reason thereof plaintiff was made ill and confined to the hospital for two weeks; defendant demurred to the complaint, which was the ninth complaint, including amendments, which plaintiff had filed for this same slander, and the demurrer was sustained on the ground that the special damage alleged was insufficient); Allsop v. Allsop, 5 N. & N. 534, 157 Eng. Reprint 1292 (1860) (action by husband and wife for slander on wife with averment that wife was rendered ill and husband put to expense in curing her, insufficient.)

This doctrine that sickness is not "'special damage" is rather surprisingly harsh, and has usually been announced, as appears from the foregoing instances, in cases where the particular plaintiff's claim has little appeal to the court's sense of justice. That the adequacy of the "special damage" alleged may depend on the court's view of the justice of plaintiff's case generally is

enough, either,—that being the stock element of damage in defamation cases generally—nor is the fact that friends and associates have been alienated.[17] A famous leading case even found wanting as special damage the fact that a wife, defamed, was forced by her husband to leave his house.[18] In cases which appear not to be meritorious it is hard to meet the court's tests of definiteness, pecuniary character, and foreseeability or "naturalness," in respect to the "special damages," but if the defamation appears to have been a matter of serious import the court is likely to look at the pleading and proof of "special damage" with a less critical eye. In addition to the loss of a particular contract, or sale, or employment,[19] it has been held in England that the loss of the hospitality of a friend,[20] or the exclusion from entry into an association, membership which carries pecuniary advantage,[21] is enough. Recent American decisions sustaining the sufficiency of claims of special damage are few.

(3) *Definiteness required in pleading and proving "special damage."*

In cases where "special damage" must be shown, the courts require that the pleader identify the particular loss with a definiteness which is not ordinarily requisite in pleading damages. Here the standard practice is to require that the loss contract, employment, sale, or other valuable thing, be identified in pleading and proof by

illustrated in Underhill v. Welton, 32 Vt. 40 (1859). In that case the slander consisted in calling the plaintiff a whore, and the court held that allegations that plaintiff, due to grief, was hindered in carrying on her household affairs, were an adequate pleading of special, pecuniary damage. Likewise, in a case where the defendant had spread the rumor that plaintiff, an unmarried young woman, had been delivered of a child, the court, denouncing but adhering to the common law doctrine that imputations of unchastity are not actionable without special damage, held sufficient an allegation that "the plaintiff became dejected and grieved in mind, enfeebled in body, her health impaired so as to be thereby prevented from attending to her ordinary business." "Any damage, however slight," the court said, "is sufficient." McQueen v. Fulgham, 27 Tex. 464 (1864) (judgment for plaintiff reversed because of insufficient proof that plaintiff's illness was caused by the slander).

[17] Allsop v. Allsop, *supra* note 13; Weldon v. DeBathe [1884] 54 L. J. (Q. B. 113); BOWER, ACTIONABLE DEFAMATION (2d ed. 1923) 34.

[18] Lynch v. Knight, 9 H. L. Cas. 577, 11 Eng. Reprint 854, 8 Eng. Rul. Cas. 382 (1861). The result is placed, however, on the ground that the husband's act is not a "natural and probable" consequence of the defamation, rather than on the theory that the loss was not a temporal one.

[19] Storey v. Challands, 8 C. & P. 234, 173 Eng. Reprint 475 (1837); Dixon v. Smith, 5 H. & N. 450, 157 Eng. Reprint 1257 (1860) (loss by an accoucheur of a definite employment); BOWER, ACTIONABLE DEFAMATION (2d ed. 1923) 32.

[20] Moore v. Meagher, 1 Taunt. 39, 9 Rev. Rep. 702, 127 Eng. Reprint 745 (1807).

[21] Chamberlain v. Boyd, L. R. 11 Q. B. D. 407, 416 (1883) *semble* (but the court held that the mere deprivation of a *chance* of being selected for membership was not enough).

name, date and place.[22] General statements that the plaintiff has lost patronage or business of a given amount,[23] or that he would have derived profits to a certain amount,[24] are not enough where, so far as appears, these specific details would be known by the plaintiff, and could be furnished. Thus if plaintiff claims that she has lost opportunities to marry, she must specify,[25] and so of loss of particular sales or regular customers.[26] But where the plaintiff can, under the circumstances, only know that the flow of his business as a whole is diminished, and it would be impossible to point to any specific customers or orders which have been lost, then it is sufficient to plead and prove the total loss generally. In the words of Bowen, L. J.: "In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done."[27]

[22] Pascone v. Morning Union Co., 79 Conn. 523, 65 Atl. 972 (1907) (allegation that several customers, not naming them, had declined to enter into certain business engagements, insufficient); DeWitt v. Scarlett, 113 Md. 47, 77 Atl. 271 (1910) (publication had destroyed plaintiff's credit, and had caused "many persons" to refuse to sell to him on the usual terms, so that plaintiff's business, worth $10,000, was seriously injured, insufficient); Lemmer v. The Tribune, 50 Mont. 559, 148 Pac. 338 (1915); Tower v. Crosby, 214 App. Div. 392, 212 N. Y. S. 219 (1925) (general financial loss alleged, with no statement of particular contracts or customers lost, insufficient); Denney v. Northwestern Credit Co., 55 Wash. 331, 104 Pac. 769 (1909) (loss of credit, insufficient, without specifying persons who have withdrawn credit, or showing that such specification is impossible).

[23] Halliday v. Maryland Casualty Co., 115 Miss. 56, 75 So. 764 (1917); Tower v. Crosby, 214 App. Div. 392, 212 N. Y. S. 219 (1925).

[24] See Ruble v. Kirkwood, 125 Ore. 316, 266 P. 252 (1928) (in an action by a stock salesman the sufficiency of proof of special damage was in question. The court said: "He claims a loss of profit on sales of stock which he could have made in the future. There is no evidence as to any probable sales or to any contracts with particular customers who would have bought this stock. . . . The bald statement of plaintiff that he could have made a net profit of $5000 will not suffice").

[25] Hunt v. Jones, Cro. Jac. 499, 79 Eng. Reprint 426 (1618); Barnes v. Prudlin, 1 Sid. 396, 82 Eng. Reprint, 1178 (1667).

[26] Fenn v. Dixe, 1 Rolle's Abridgm. 58 (1638).

[27] Ratcliffe v. Evans, L. R. [1892] 2 Q. B. 525, 532 (the defendant falsely and maliciously published the statement in a newspaper that plaintiff had ceased to carry on his business of engineer and boiler-maker. Proof of general loss of business without specific showing of loss of particular customers or orders was held sufficient. While the court distinguished the case, as one of malicious

(4) *"General Damages"; the Basis of Compensation.*

In the three preceding paragraphs we have considered the burden imposed on the plaintiff in defamation cases of the class which is not actionable "per se," of pleading and proving "special damage," before he will be allowed to recover anything at all. Let us assume that the plaintiff has successfully avoided this burden by showing that his claim is of the kind that is actionable "per se,"[28] or has satisfied the burden by showing a particular injury flowing from the slander. We must then consider the rules regulating ascertainment of the actual award of damages.

In the first place, if particular injury, "special damage," has been pleaded and proved sufficiently to meet the requirements for liability, it is obviously sufficient as a basis for assessing an award of damages. But in cases where "special damage" need not be pleaded (cases of libel and of slander actionable "per se"[29]) the plaintiff is relieved from the necessity of producing any proof whatsoever that he has been injured. From the fact of the publication of the defamatory matter by the defendant, damage to the plaintiff is said to be "presumed," and the jury, without any further data, is at liberty to assess substantial damages, upon the assumption that the plaintiff's reputation has been injured and his feelings wounded.[30] More often, how-

trade-disparagement, from cases of defamation proper, it considered that the rule in this respect is the same in both), followed in Erick-Bowman Remedy Co. v. Jensen Salsberry Laboratories, 17 F. (2d) 255 (C. C. A. 8th, 1926) (trade-disparagement, allegations of damage held insufficient). See also Craig v. Proctor, 229 Mass. 339, 118 N. E. 647 (1918); Ross v. Fitch, 58 Tex. 148 (1882). Another recent trade-disparagement case appears more restrictive, as it seems to disregard the factor of difficulty of identifying the items of loss, and holds that in any event the details must be pleaded. Shaw Cleaners and Dyers v. Des Moines Dress Club, 245 N. W. 230 (Ia. 1932). A discriminating discussion of the problem may be found in BOWER, ACTIONABLE DEFAMATION (2d ed. 1923) 33 note.

[28] *Supra,* sec. 1 of this article.

[29] *Supra,* sec. 1 of this article. The traditional rule of the English common law is that *any* libel is actionable "per se." But, as appears from the above section, many American courts, misunderstanding the "per se" phrase, have required pleading and proof of special damage in libel cases, where the defamatory meaning is not apparent in the face of the libel. Other cases, in considering the necessity of proving damage, seem impliedly to suggest that if the libel charges matter which if oral would be actionable per se (e.g. charges of crime and disease, or business detractions) then damage is presumed without proof. Cases, *infra* note 30.

[30] Starks v. Comer, 190 Ala. 245, 67 So. 440, (1914) (libel charging plaintiff, a candidate for nomination as Railroad Commissioner, with unfitness; verdict for substantial damages sustained though evidence showed plaintiff's reputation not injured, on ground jury entitled to infer humiliation); Barnett v. McClain, 153 Ark. 325, 240 S. W. 415 (1922) (libel charging fraud and perjury; defendant held not entitled to have jury instructed that plaintiff can

ever, some direct evidence is given to support the claim of "general" damages and it becomes important to ascertain what elements of injury are compensated under this head.[31]

The principal elements would seem to be these: (1) the injury to the plaintiff's reputation,[32] (2) the general falling-off of business, patronage, or custom,[33] (3) wounded feelings, and humiliation,[34]

recover only nominal damage unless he proves actual injury); Clark v. McClurg, 215 Cal. 279, 9 P. (2d) 505, 507 (1932) (slander and libel, defamatory per se, injury "conclusively established" from proof of the publication); Ventresca v. Kissner, 105 Conn. 533, 136 Atl. 90 (1927) (slander, in charging plaintiff with being a thief; plaintiff held entitled to recover without proof beyond the publication, for such injury to reputation and feelings as would naturally be presumed); Brown v. Publishers: George Knapp & Co., 213 Mo. 655, 112 S. W. 474, 485 (1908) (libelous charge of perjury); Gressman v. Morning Journal Ass'n., 197 N. Y. 474, 90 N. E. 1131, 1133 (1910) ("In cases of libel, the law presumes that the plaintiff has been damaged by the publication and the jurors are to reach the amount of the damages from the nature of the libel, the extent of its circulation, the social position of the parties, and the tendency to injure the plaintiff in the public estimation of his character"); James v. Powell, 154 Va. 96, 152 S. E. 539 (22) (1930) (libelous charge of robbery, instruction that law presumes damage, approved).

[31] As we have seen, "special" damages must be pleaded and proved particularly, "general" damages need not. This is sometimes explained on the theory that "general" damages are those which are the "necessary" result of the defamation, whereas "special" damages are merely the "natural and proximate," but not "necessary" result. Eby v. Wilson, 315 Mo. 1214, 289 S. W. 639, (1926); Manley v. Harer, 73 Mont. 253, 235, Pac. 757, 759 (1925); TOWNSHEND, SLANDER AND LIBEL (4th ed.) §146; 36 C. J. 1150. It seems dubious, however, whether this corresponds with the facts. Injury to reputation and injury to feelings, allowable as "general" damages are by no means the inevitable results of a false accusation. It is believed that in truth, the requirements about special damage rest not upon any analytical distinction but wholly upon the historical division between defamations which were originally punishable as sins, in ecclesiastical courts, and those inflicting temporal harm and remediable in the King's tribunals. See *supra*, note 5.

[32] Craney v. Donovan, 92 Conn. 236, 102 Atl. 640, L. R. A. 19180, 96; DEC. & CURR. DIG., *Libel and Slander* §117.

[33] Corsello v. Emerson Bros., Inc., 106 Conn. 127, 137 Atl. 390 (1927) (defendant newspaper publisher accuses plaintiff, lawyer, of procuring from a girl a false affidavit charging police officer with indecent assault; held, actionable per se, and plaintiff could testify as to the general diminution of his law practice, though this was not pleaded, but it was not permissible to give evidence of the loss of a particular employment in a case, as this latter would have to be pleaded as special damage); Poleski v. Polish American Pub. Co., 254 Mich. 15, 235 N. W. 841 (1931) (newspaper libel in charging plaintiff, a Polish lawyer and real estate man, with being associated with Ku Klux Klan; plaintiff allowed to give evidence of aggregate loss of profits and diminution of volume of real estate business; Williams Printing Co., 113 Va. 156, 73 S. E. 472 (3) (1913) (evidence of general decline in business). Additional cases are cited, 37 C. J. 93, n. 67.

[34] Pion v. Caron, 237 Mass. 107, 129 N. E. 369 (1921) (slander, actionable per se); Baker v. Winslow, 184 N. C. 1, 113 S. E. 570 (1922) (same); Viss v. Calligan, 91 Wash. 673, 158 Pac. 1012 (1916) (same). It is only the mental suffering resulting from the publication of the charge to others and from the consequent harm to the reputation, that can be considered, not that

and (4) physical pain and illness resulting from the injury to the feelings[35]—though this last is rejected by some courts.[36] As in other instances of completed wrong-doing, the defendant is liable to pay once for all, not only for harms already suffered by plaintiff, but for injury to business, reputation, and feelings which plaintiff probably will sustain in the future.[37]

(5) *Proving general damage.*

If the defamation relates to the plaintiff in his business or profession, the reputation he bears in that capacity may be shown.[38] It

resulting directly from mere accusation. Greenlee v. Coffman, 185 Iowa, 1902, 171 N. W. 580 (1919). See DEC. & CURR. DIG., *Libel and Slander* §119, and compare cases *supra* note 12, holding mental suffering insufficient as special damage.

Much comment has been provoked by the question, may the plaintiff recover for mental distress occasioned by the humiliation suffered by the members of the plaintiff's family over the libel. Recent cases say no, although the line between this and plaintiff's distress over the estrangement of family and friends—which may be shown—is a close one. Dennison v. Daily News Pub. Co., 82 Neb. 675, 118 N. W. 568 (1903) (plaintiff cannot recover for the grief of his wife on reading the libel, nor for the influence of her grief on his own feelings); Bishop v. New York Times Co., 233 N. Y. 446, 135 N. E. 845 (1922) (plaintiff, mother, not allowed to give evidence of child's humiliation and fear on learning that mother is charged with being insane, for purpose of showing her own distress consequent on child's feelings) commented upon (1922) 36 HARV. L. REV. 226 (1922), 22 COL. L. REV. 678 (1922), 8 CORN. L. Q. 65.

[35] Sweet v. Post Pub. Co., 215 Mass. 450, 102 N. E. 660 (1913), (newspaper libel of attorney, identifying him as person indicted for fraud; injury to business and to feelings alleged; held, "plaintiff was entitled to recover for mental suffering and distress and for illness suffered by him in consequence of the libel") ; Garrison v Sun Printing & Pub. Ass'n, 207 N. Y. 1, 100 N. E. 430 (1912) (newspaper libel of wife, defamatory per se, husband recovers for loss of wife's services due to illness brought about by her mental distress).

[36] Butler v. Hoboken Printing & Pub. Co., 73 N. J. L. 45, 62 Atl. 272 (Sup. Ct. 1905) (newspaper libel of "Annie Oakley," a crack shot in Buffalo Bill's Show, causing loss of engagement, mental distress, and sickness; new trial granted because of instruction permitting the jury to consider sickness as element of general damage [*supra* note 13 for cases holding such sickness not a ground of special damage]. Fact that jury allowed $3000 against small newspaper which was only one of many which published a dispatch sent from Chicago, probably influenced court). *Cf.* Cyrowsky v. Polish-Am. Pub. Co., 196 Mich. 648, 163 N. W. 58 (1917) (the court approved the admission, in a libel case, of evidence for the plaintiff that sleeplessness, headaches, and loss of weight would be the natural result of mental anguish suffered by the plaintiff, as evidence of the severity of the mental suffering, but said by way of dictum that no recovery could be had for the physical ailment itself).

[37] Craney v. Donovan, 92 Conn. 236, 102 Atl. 640(11) (1917); Elms v. Crane, 118 Me. 261, 107 Atl. 852 (1919); BOWER, ACTIONABLE DEFAMATION (2d ed. 1923) 154.

[38] Draper v. Hellman Commercial Trust & Savings Bank, 203 Cal. 26, 263 Pac. 240(30) (1928) (libelous charge of embezzlement against plaintiff, bank employee; plaintiff allowed to give evidence in chief of his good reputation

would be supposed also, since injury to reputation is the gist of the action, that in all cases the kind of reputation borne by the plaintiff in the community could always be shown by him in making out his case, but surprisingly enough, this is usually held to be improper, on the ground that good reputation is presumed. Proof of it can only be brought forward in reply, in case defendant strikes at plaintiff's character by attempting to prove that the charge for which he is sued was true, or by showing that the plaintiff's reputation was already bad, on the issue of damages.[39] But under another formula, by which the plaintiff is permitted to prove his rank and condition in life,[40] and his social and financial[41] standing, practically the same purpose is accomplished.

In establishing the damaging effect of the publication, the extent of its "circulation" seems clearly material. In cases of newspaper libel, the broadcasting of the libel being done by the defendant himself, it is of course competent to show the numbers distributed and the area covered.[42] In other cases of defamation, it seems that generalized statements by witnesses that the slanderous story was widely commented on in the community may be shown,[43] but an early and rather arbitrary doctrine has retained wide currency, to the effect that specific instances of the repetition of a slander or libel, by a person other than the defendant, cannot be considered,[44] unless it was ap-

among bankers, but evidence of his good reputation generally in the community should be postponed to rebuttal; but admission of latter in chief not prejudicial).

[39] Davis v. Hearst, 160 Cal. 143, 116 Pac. 530 (30) (1911); Howland v. George F. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656 (1892); Kovacz v. Mayoras, 175 Mich. 582, 141 N. W. 662(5) (1913). But there are some enlightened decisions permitting the evidence as part of plaintiff's case. Sheriff v. Cartee, 121 S. C. 143, 113 S. E. 579, 580 (1922); Stark v. Publishers: George Knapp & Co., 160 Mo. 529, 61 S. W. 669(1) (1901) (on issue of damages only).

[40] Examiner Printing Co. v. Aston, 238 Fed. 459(2) 151 C. C. A. 395 (1916) (professional standing as engineer); Estelle v. Daily News Pub. Co., 101 Neb. 610, 164 N. W. 558(4) (1917); Bingham v. Gaynor, 135 App. Div. 426, 119 N. Y. S. 1010(3) (1909); 37 C. J. 94 n. 94.

[41] Sotham v. Drovers' Tel. Co., 239 Mo. 606, 144 S. W. 428(8) (1912).

[42] Dalton v. Calhoun County Dist. Court, 164 Iowa 187, 145 N. W. 498 (1914); DEC. & CURR. DIG., *Libel and Slander* §107 (2); 37 C. J. 93, n. 69.

[43] Williams v. Fulks, 113 Ark. 82, 167 S. W. 93 (1914) (evidence that slender had been generally circulated in community competent as showing damage); Bahrey v. Poniatishin, 95 N. J. L. 128, 112 Atl. 481(2) (1921) (same); Smith v. Moore, 74 Vt. 81, 52 Atl. 320 (1901) (same); Rice v. Cottrell, 5 R. I. 342 (1858) (same); Suick v. Krom, 171 Wis. 254, 177 N. W. 20 (1920) (same); DEC. & CURR. DIG., *Libel and Slander* §107 (2); 37 C. J. 93, n. 69; Ann. (1919) 16 A. L. R. 726 at 739.

[44] Maytag v. Cummins, 171 C. C. A. 110, 260 F. 74, 16 A. L. R. 712 (1919) (defendant, president of railway company, charges plaintiff, traffic manager,

parently intended by the defendant that it should be repeated. The exclusion was based upon the proximate cause formula, coupled with the doctrine that an intervening and independent wrong-doing breaks the chain of causation.[45] Seemingly, however, the main end of the law in protecting one's interest in his good name, is to give a remedy for this very harm, that is, the humanly inevitable spreading and repetition of the ugly story. Consequently, even where the repetition is claimed as special damage, a strong argument for its allowance can be made, and the rule which rejects it may be regarded as a survival of a time when defamation suits were regarded with such disfavor that courts were disposed to seize upon rather flimsy pretexts for limiting liability.[46] Can the exclusion of evidence

with theft, in presence of other officers and directors; trial court admitted evidence defendant's accusation was the subject of report on the streets of the city: verdict, $22,500; reversed for the admission of this evidence, the opinion containing a full review of the decisions; Stone, Circ. J., dissenting in a forcible and persuasive opinion); Age-Herald Pub. Co. v. Waterman, 188 Ala. 272, 66 So. 16 (1913) (publisher of newspaper libel not responsible for its republication in other newspapers); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, (1891) (newspaper libel; in disapproving instruction allowing damages for repetitions if "normal and probable," Holmes, J., for the court, says: "The meaning which naturally would be conveyed to the jury is, that, although a particular republication cannot be recovered for, damages may be enhanced by the general probability of unlawful republications. This is not the law. Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual."); Rigney v. W. R. Keesee & Co., 104 W. Va. 168, 139 S. E. 650 (1927) (libelous letter, shown around); Ward v. Weeks, 7 Bing. 211, 131 Eng. Reprint 81 (1830) (oral slanderous words spoken to X, who repeated them to Y, who refused to deal with plaintiff, held, the foregoing is not an adequate showing of special damage). Cases are collected: Ann. (1919), 16 A. L. R. 726; (1925) 41 A. L. R. 1191; DEC. & CURR. DIG., *Libel and Slander* §§26-29, 107 (2).

[45] See Maytag v. Cummins, 260 Fed. 74 (C. C. A. 8th, 1919) (per Sanborn, Circ. J., "It is an illegal act to repeat a slander, an act for the damages from which the victim of the repetition may maintain an action against the repeater. The basic legal presumption on which law and the general action of mankind are based is that men will refrain from unlawful acts, will obey the law, and discharge their duties, and the great majority do so. So it is that the legal presumption is that a slander will not be repeated, and that its unauthorized repetition, and current rumors and reports of it, and the damages therefrom, are not to be anticipated by the originator, and are not the natural or probable consequences thereof. But the proximate cause of such damages is the illegal intervening repetition, or the making by third persons of the current reports and rumors, which turn aside the natural sequence of events and isolate the damages from the unauthorized repetition from those from the original slander"). This doctrine probably is explainable as a mode of limiting the extent of responsibility for defamation, on unexpressed grounds of policy. See GREEN, PROXIMATE CAUSE (1927) c. 1 §3.

[46] The early English cases, which originated the doctrine of exclusion, were cases where the repetition and its consequences were relied on as special

of specific repetitions, when offered to show general damage to reputation, be defended at all? If so, it must be on grounds of trial convenience in avoiding the time consumed in telling the necessarily detailed accounts of such incidents, and in escaping exaggeration of the extent of injury by such "piling on of the agony." This justification assumes that the plaintiff will be allowed, as suggested above, to adduce evidence in general terms of the extent of the comment and discussion in the community about the defamation.[47] A substantial number of courts have gone further, and have not only allowed evidence of general report, but have modified the rule of exclusion of specific repetitions. These cases restate the formula, affirmatively as a rule fixing liability for repetition, not only when intended by the original author, but wherever the repetition is reasonably to be anticipated under the circumstances.[48] This in effect reverses the assumption, upon which the older doctrine was based, that it is not reasonable to anticipate that people who learn of a slanderous charge, will repeat

damage. Thus a rule of absolute exclusion developed, before it was perceived that different considerations might apply to evidence of specific instances of repetition, offered merely to show how widespread was the injury to reputation, under the claim of general damage.

[47] *Supra* note 43.

[48] Speight v. Gosnay, 60 L. J. (Q. B.) 231 (1891) (defendant communicated to plaintiff's mother an imputation of plaintiff's unchastity; the mother repeated them to plaintiff, who repeated them to her *fiancé:* judgment for plaintiff reversed on ground that responsibility for repetition attaches only where the original author (1) intended it, or (2) it was the natural consequence, or (3) the original publication was to someone who was under a legal or moral duty to repeat it to the person to whom it was republished and that this repetition was not within these classes)—a result which Bower brands as "astonishing", BOWER, ACTIONABLE DEFAMATION (2d ed. 1923) 31 note (S); Elms v. Crane, 118 Me. 261, 107 Atl. 852 (1919); Bigley v. National Fidelity and Casualty Co., 94 Neb. 813, 144 N. W. 800, (1913); Sawyer v. Gilmer, 189 N. C. 7, 126 S. E. 183 (1925) (store-manager, in presence of crowd, impliedly accuses plaintiff, a 14 year old girl, of theft; court admitted evidence of witness who testified that this incident was related by an unidentified person in a large group; apparently this had been pleaded as special damage; verdict, $2500; held, evidence properly admitted, and author of defamation is liable for repetition, if reasonably foreseeable, which is for jury); Southwestern Tel. and Tel. Co. v. Long, 183 S. W. 421 (Tex. Civ. App., 1915) (reflections by telephone employee, upon chastity of plaintiff, 19 year old girl; defendant requested an instruction, that in considering damages the jury was limited to the effect produced by the utterance of the original author; refused: verdict, $20,000; held, properly refused. "Ought a party who utters words so derogatory as to constitute slander *per se* be held to have reasonably anticipated that they would be repeated? We think so.") Ann. (1919) 16 A. L. R. 726, at 734, 737, 738. *Cf.* Poleski v. Polish American Pub. Co., 254 Mich. 15, 235 N. W. 841 (1931) (testimony of witnesses telling of comments of other persons to them about libelous newspaper articles held competent to show the extent and effect of the publication, in support of the allegation of general damage).

the story and thus commit a new wrong. If a discretion be recognized in the trial judge to confine the evidence within the bounds of reasonable illustration of the currency of the story set in motion by the defendant, the view of these cases seems a reasonable one.

Evidence of those who have heard or read the defamation, as to the impression made upon them, is competent to show the damaging effect upon plaintiff's reputation.[49] The better view, likewise, would seem to permit testimony as to change in manner or conduct of plaintiff's family, friends, and acquaintances toward him, in consequence of the detraction.[50]

Of course, evidence of defendant's standing position and influence generally in the community is admissible to help the jury to gauge the probable weight which would be given to his disparaging word.[51] A ticklish balancing of values is involved in determining whether to admit proof on the plaintiff's behalf, of the wealth of the defendant. The slanderous word of a banker or large landholder would, other things equal, be much more blighting to the reputation of the person wronged than the word of one who has no "stake in the community." On the other hand, the jury is not likely to confine its consideration of the fact that the defendant is wealthy to the issue of the effect of his words, but will almost inevitably feel that defendant should be made to pay according to his wealth. However appropriate such a feeling when punishment is the object,[52] it is much less so, when the avowed purpose is solely to assess compensation.[53] Consequently we

[49] Van Lonkhuyzen v. Daily News Co., 195 Mich. 283, 161 N. W. 979 (1917).

[50] Bishop v. New York Times Co., 233 N. Y. 446, 454, 135 N. E. 845 (1922) (court expressed its opinion that "plaintiff is not compelled to rely upon a favorable presumption . . . but that he may prove if he can that he has been avoided and shunned by former friends and acquaintances as the direct and well-connected result of the libel," but held that the question of admissibility was not properly raised) criticized in an article, *Direct Proof of General Damages by Defamation* (1924) 2 N. Y. L. Rev. 305. *Contra:* Sheftall v. Central of Ga. R. Co., 123 Ga. 589, 51 S. E. 646 (11) (1905) (on ground that jury can judge of effect without other evidence than the accusation itself); *cf.* McDuff v. Detroit Evening Journal, 84 Mich. 1, 47 N. W. 671(1) (1890) (specific instances of slight or aversion, come in if at all only when pleaded as special damage).

[51] Sclar v. Resnick, 192 Ia. 669, 185 N. W. 273(9) (1921); Ellis v. Whitehead, 95 Mich. 105, 54 N. W. 752(8) (1893); Smith v. Moore, 74 Vt. 81, 52 Atl. 320(4) (1902).

[52] Whether the evidence may come in on the issue of punitive damages, is discussed in the next section.

[53] The line between compensation and punishment may not be as clear-cut as the courts usually assume that it is, See 1 Street, Foundations of Legal Liability (1906) 497.

find the courts divided, the majority admitting evidence of the defendant's wealth,[54] or his reputed wealth,[55] with a caution that it is to be considered by the jury solely in the issue of the effect of the defamation,[56] but a substantial minority excluding it altogether.[57]

(6) *Exemplary or Punitive Damages.*

The subject of punitive damages has been treated fairly extensively in an earlier article,[58] and will only be briefly touched upon here in its application to defamation cases. Since exemplary damages are avowedly directed toward punishment, the general canons regulating compensation are inapplicable. The principal doctrines governing the award of exemplary damages which come into play in defamation cases are these: (1) "actual malice" in the sense of ill-will, or fraud, or reckless indifference to consequences, must be brought home to the defendant by the evidence, according to the prevailing view;[59] (2) the rule which obtains in some,[60] but not most jurisdic-

[54] Miller v. Cook, 124 Ind. 101, 24 N. E. 577 (1890) (evidence that defendant had made conveyances, after action threatened, held admissible to show his financial standing); Burch v. Bernard, 107 Minn. 210, 120 N. W. 33 (1909) (same); Womack v. Circle, 29 Gratt. 192 (Va. 1877) (tax assessment books admitted to show defendant's wealth).

Cases collected: DEC. & CURR. DIG., *Libel and Slander*, §107 (3); 37 C. J. 95 §529, notes 6-11; ANN. (1923) 34 A. L. R. 3; (1930) 78 U. PA. L. REV. 785.

[55] The distinction between actual wealth (which may usually be shown on the issue of punitive damages, see the next section). and reputed wealth is insisted on in the following cases: Darling v. Mansfield, 222 Mich. 278, 192 N. W. 595 (1923); Weiss v. Weiss, 95 N. J. Law, 125, 112 Atl. 184 (1920) commented upon (1920) 5 MINN. L. REV. 397. While the evidence of reputed wealth seems more expeditious, and points more directly to the issue on which it is to be used, the evidence of the actual wealth of a person would indicate that he was regarded as wealthy in the community. The distinction seems hardly worth its salt. If wealth is to be considered at all on compensatory damages, then either actual or reputed wealth should be allowed.

[56] See Brown v. Barnes, 39 Mich, 214, 33 Am. Rep. 375 (1878).

[57] Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489 (1854); Sclar v. Resnick, 192 Ia. 669, 185 N. W. 273 (1921) commented upon (1922) 7 IA. L. BULL. 187 and adversely (1922) 70 U. PA. L. REV. 225 (slander for calling plaintiff an immoral woman; "plaintiff offered proof that defendant's wealth was variously estimated to be $30,000, $40,000, or $50,000. . . . We are prepared to entirely abrogate the rule permitting such evidence. The general reputation and standing of the defendant may be shown, as bearing upon the influence his words might have in the community; but we do not think that the plaintiff should be allowed to offer proof of defendant's reputed wealth in specific amount, as was done in the instant case. This evidence should have been excluded"); Tymann v. Schwartz, 209 App. Div. 886, 205 N. Y. S. 493 (1924); Young v. Kuhn, 71 Tex. 645, 9 S. W. 860 (1888).

[58] McCormick, *Some Phases of the Doctrine of Exemplary Damages* (1931) 8 N. C. L. REV. 129.

[59] Recent defamation cases applying the requirement that actual ill-will, fraud, or recklessness must be proved and found: Memphis Press-Scimitar Co. v. Chapman, 62 F. (2d) 565 (C. C. A. 6th, 1933) (reckless indifference to facts by editor of newspaper renders publishing corporation liable to exemplary

tions, that exemplary damages require for their foundation a finding that actual damage has been sustained;[61] (3) the jury must be ac-

damages, though no actual malice; reversed for errors in other instructions); Ventresca v. Kissner, 105 Conn. 533, 136 Atl. 90 (1927) (jury could have inferred actual malice from the circumstances); Evening News Co. v. Bowie, 154 Md. 604, 141 A. 416 (1) (1928) (newspaper libel, defendant pleads truth, held, an instruction authorizing punitive damage if jury finds plea not sustained, proper, since a failure to sustain the plea of truth is itself evidence of malice); Poleski v. Polish American Pub. Co., 254 Mich. 15, 235 N. W. 841 (6) (1931); Lindsey v. Evening Journal Asso., 10 N. J. Misc. 1275, 163 Atl. 245 (3) (1932) (under statute, barring exemplary damages against newspapers unless actual malice proved, or failure to retract); Corrigan v. Bobbs-Merrill Co., 228 N. Y. 58, 126 N. E. 260, 263 (1920); Stevenson v. Marris, 288 Pa. 405, 136 Atl. 234 (3) (1927); Rosenberg v. Mason, 157 Va. 215, 160 S. E. 190 (14) (1931) (arguendo). Even so, the evidence of malice may be circumstantial, and if the libel was knowingly false this is sufficient to show actual malice. Plecker v. Knottnerus, 201 Ia. 551, 207 N. W. 574 (1926). But it is error to instruct, in a case of libel "per se," that "the law presumes malice, from which punitive damages follow." Hallien v. Tarrytown Daily News, Inc., 235 App. Div. 869, 257 N. Y. S. 543 (1932).

A few jurisdictions adhere to the view that the so-called "implied," that is, unproved, malice, suffices to support punitive damages, at least where the words are actionable *per se*. See Lion Oil Co. v. Sinclair Refining Co., 252 Ill. App. 92, 106 (1929) (action against corporation for slander in statements by its salesmen that plaintiff, rival company, was going out of business; verdict for $100,000; affirmed. "The law implies malice where the words are untrue and slanderous *per se* and, under such circumstances, the jury may award exemplary damages"); Shepard v. Brewer, 248 Mo. 133, 154 S. W. 116 (1913). Decisions collected: DEC. & CURR. DIG., *Libel and Slander* §120 (2); 37 C. J. 125-6 §586.

[60] This view seems to be adopted in Iowa, Kansas, Maine, Missouri, Texas, Vermont, and Wisconsin. Decisions collected: ANN. (1923) 33 A. L. R. 384, at 400; (1932) 33 A. L. R. at 400, 81 A. L. R. 913; DEC. & CURR. DIG., DAMAGES §87 (2); 17 C. J. 968-974. See (1932) 17 IA. L. REV. 413; (1932) 16 MINN. L. REV. 438; (1932) 10 TEX. L. REV. 238.

[61] In defamation cases if the defamation is not actionable without proof of special damages (*supra* §1) then of course no cause of action is made out, and no award of damages, compensatory or exemplary, can be given unless actual pecuniary injury is pleaded, proven, and found. If the words are actionable without proof of special damage, as being a charge of crime, disease, or business unfitness, etc. (*supra* §1) or if written, are "libelous *per se*" (*supra* §1) then actual injury is presumed *supra* §2) and a cause of action is established without specific proof of the fact of injury or its extent, and exemplary damages may be awarded. Fitchett v. Sumter Hardwood Co., 145 S. C. 54, 142 S. E. 828 (1928). If required to separate the amounts of compensatory and exemplary damages, in such situation the jury is likely to award either nothing or a nominal sum as compensation, and give a substantial amount as exemplary damages. Such a verdict should stand. Clark v. McClurg, 215 Cal. 279, 4 P. (2d) 149, 9 P. (2d) 505 (1932) (slander *per se*, verdict leaving blank amount for damages, $5000 punitive damages, affirmed, verdict being construed as including both actual and punitive damages in one finding); Wright v. Cofield, 146 Va. 637, 131 S. E. 787 (1926) (under statute allowing recovery for insulting words, verdict for $1 actual, $999 punitive, approved). [See notes and references, *supra* note 60]. But the courts of the states mentioned in the preceding note, seemingly even where the words are defamatory *per se* will not countenance an award of exemplary damages, where the jury makes a separate finding of compensatory damages in a merely nominal amount. See for example, Anderson v. Alcus, 42 S. W. (2d) 294 (Tex. Civ. App. 1931)

corded in the instructions a free discretion to withhold any award of exemplary damages whatever, even though malicious or wanton conduct be proved without dispute.[62]

In respect to evidence, the same problem recurs, which we have already discussed in its relation to compensatory damages,[63]—may the defendant's wealth be shown? While its prejudicial effect is the same, yet here the logical force of the argument that the jury cannot know what assessment will properly punish the defendant unless they know the size of his estate has led to general adoption of the practice of admitting evidence of the defendant's actual wealth, where a case is made out for exemplary damages.[64]

(7) *Aggravation and Mitigation: Malice: Plaintiff's Bad Reputation.*

A rather loose and vague usage has long prevailed by which the introduction of evidence of various kinds, in defamation cases, when objected to, is justified on the ground that it is admissible "in aggravation of damages" or "in mitigation of damages," as the case may be.[65] These nebulous expressions are seldom subjected to any close analysis by the lawyers and judges who use them, and have sheltered with their misty protection some quite miscellaneous items of proof. Probably "aggravation and mitigation" have two connotations: first, of the aggravated, or excusable character of *defendant's conduct;* and second, more generally, of the enhancing or lessening of the plaintiff's *injury,* and the *jury's award.*[66] In the first sense, the term points to facts which bear upon the proof or disproof of actual *malice* on defendant's part. In the second, any facts which bear upon the amount of damages to be awarded would be included, and the term would embrace all of the matters discussed in previous sections

(slander *per se,* calling plaintiff a thief; verdict, actual damages, "none," exemplary, $500, reversed); cases cited, ANN. (1923) 33 A. L. R. 384, at 400.

[62] Ballew v. Thompson 259 S. W. 856 (Mo. App. 1924) (slander, failure to inform jury exemplary damages matter of discretion, erroneous); Bresler v. New York American, 227 App. Div. 575, 238 N. Y. S. 296 (1930) (libel, same holding). For other cases, 8 N. C. L. REV. 147 note 106.

[63] *Supra* notes 52 and 53.

[64] Interstate Co. v. Garnett, 154 Miss. 325, 122 So. 573 (16) on rehearing 122 So. 756 (1929) (evidence of amount of capital stock, surplus, total assets, and dividends paid, of defendant corporation held properly received on issue of exemplary damages); Reese v. Fife 279 S. W. 415 (18) (Mo. App. 1925) (instruction that jury may consider defendant's poverty or wealth, on exemplary damages, proper). Cases collected: DEC. & CURR. DIG., *Libel and Slander* §107 (4); ANN. (1923) 34 A. L. R. 3, 8; 37 C. J. 96 §534.

[65] Cases collected: NEWELL, SLANDER AND LIBEL, (4th ed. 1924) §§760-788; DEC. & CURR. DIG., *Libel and Slander* §§27, 52-67, 104, 110-112.

[66] Compare the analysis of these terms by Wheeler, J., in Craney v. Donovan, 92 Conn. 507, 102 Atl. 640, 642 (1917).

as bearing on the extent of plaintiff's injury from the defamation. It is often difficult to determine whether the terms are used in the one connection or the other, and the vagueness of these expressions probably lets in facts whose relevance it is difficult to analyze in logical terms—facts necessary, nevertheless, to round out the emotional setting of the story so that the jury can more nearly understand its human significance.

Malice. Most commonly, it is the defendant's malicious intent, or his absence of malice, that is the subject of evidence offered in "aggravation" or "mitigation." We have already seen that defendant's malevolence or recklessness, his "express" or "actual" malice, must be shown if exemplary damages are to be recovered,[67] and evidence pro and con upon this issue, when offered as bearing on exemplary damages, is usually termed evidence in aggravation or mitigation.[68] If exemplary damages are not claimed, but compensatory damages alone are sought, should evidence establishing or negativing malice come in on the issue of damages? In England, no sharp line is drawn, as is customary in America, between compensatory and punitive damages, so that there is little occasion to raise this question, but the English courts admit the evidence of malice or no malice, without any custom of limiting the jury's consideration to its bearing upon the matter of punishment.[69] Many American cases, however, have adopted the doctrine that if exemplary damages are not claimed, evidence of the defendant's malice or good faith is immaterial, and if exemplary damages are sought, the jury should be instructed to consider the question of malice only in its bearing upon the punitive award.[70] Other cases, fewer in number, espouse the

[67] *Supra* §6 of this note.

[68] Malice likewise is often an important issue in cases where the defense is asserted that defamatory words were conditionally privileged, since in such cases malice defeats the privilege. See DEC. & CURR. DIG., *Libel and Slander,* §51.

[69] See, for example, Pearson v. Lemaitre, 5 M. & G. 700, 134 Eng. Reprint, 742, 749 (C. P., 1843) (libel: plaintiff permitted to prove other libelous letters of defendant reflecting on plaintiff, on issue of damages); BOWER, ACTIONABLE DEFAMATION (2d ed., 1923) §§157-165; 18 HALSBURY'S LAWS OF ENGLAND, 725, 726.

[70] Palmer v. Mahin, 120 Fed. 737, 741 (C. C. A. 8th, 1903) (evidence of belief of truth of statement by publisher, and absence of ill-will, inadmissible on issue of compensatory damages); Taylor v. Hearst, 118 Cal. 366, 50 Pac. 541 (1897) (where exemplary damages not submitted, trial court correctly excluded defendant's evidence of good faith and due care); Rearick v. Wilcox, 81 Ill. 77 (1876) (reversed for failure to instruct jury that evidence of defendant's absence of malice immaterial on question of compensatory damage); Bond v. Lotz, 214 Ia. 683, 243 N. W. 586 (3) (1932) (where no claim of

more realistic attitude that the defendant's apparent ill-will may heighten the humiliation or suffering sustained by the plaintiff, and consequently that the showing of malice, or of mitigating good faith, should come in as bearing not only on exemplary, but also on compensatory damages.[71] This prevents the injustice which may result from the jury's receiving only a piece-meal story, if the plaintiff by waiving exemplary damages may prevent the defendant from explaining the circumstances which reveal a seemingly deliberate calumny as being actually a pardonable and morally innocent mistake.

The over-nice refinement of the doctrine of the majority that the defendant's good faith or ill-will come in only on exemplary damages, is balanced by the impractical subtlety of the minority who purport to reverse cases on a distinction between mitigating the "damages" and mitigating the "injury." We may believe that these delicate shadings are used only as "window-dressing" for decisions reached by appellate courts upon instinctive responses to feelings of right and wrong,

exemplary damages, error to charge jury to consider defendant's repetition of the slander on issue of damages); Callahan v. Ingram, 122 Mo. 369, 26 S. W. 1020 (5) (1894) (defendant's evidence of good faith should have been admitted on exemplary damages with caution not to consider on actual damages); Garrison v. Robinson, 81 N. J. Law 497, 79 Atl. 278, 280 (1911) (lack of malice does not reduce actual damages); Young v. Fox, 26 App. Div. 261, 49 N. Y. S. 635 (7) (1898) (charge that evidence in mitigation goes only to exemplary damages, correct); Caudrian v. Miller, 98 Wis. 164, 73 N. W. 1004 (6) (1898) (despite statute [now Wis. Stat. (1929) §263.38] permitting defendant to plead mitigating circumstances, these go only to exemplary damages).

[71] The fullest exposition of this view is found in the court's opinion, written by Wheeler, J., in Craney v. Donovan, 92 Conn. 236, 102 Atl. 640, 641 (1917) (instructions which directed the jury to govern the amount of actual damages according to "the degree of malice," held erroneous). The opinion makes this somewhat subtle distinction. Actual damages, it says, cannot be mitigated or enhanced but malice may be proven to show the extent of the actual injury, as bearing on the plaintiff's feelings and the effect of the slander on the hearers. This finds expression also in other decisions. Massee v. Williams, 207 F. 222, 234, 235 (C. C. A. 6th, 1913) (instruction that defendant's good faith or malice cannot affect compensatory damage held erroneous); Faxan v. Jones, 176 Mass. 206, 57 N. E. 359 (1900) (defendant held properly permitted to testify that he did not intend to accuse plaintiff of being a thief, as bearing upon malice and hence upon injury to plaintiff's feelings—not upon exemplary damages which are not allowed in Massachusetts); Schattler v. Daily Herald Co., 162 Mich. 115, 127 N. W. 42, 48 (1910) (instructions that absence of malice might mitigate the damages to a nominal award, held erroneous; judgment for defendant reversed. "Actual damages may be increased by reason of the malice of the defendant, because plaintiff's injury to feelings is greater when he suffers from a wrong wantonly inflicted, than when he suffers from one inflicted in good faith, but in no case can defendant's good faith mitigate or lessen the damages to reputation or feelings, which plaintiff actually does suffer, as a result of the libelous publication"); *cf.* Clair v. Battle Creek Journal Co., 168 Mich. 467, 134 N. W. 443, 446 (1912).

and yet it may be questioned whether some courts do not accept these distinctions as having importance in themselves. If so, it might well be desirable to go back to the simpler English practice of merging compensation and punishment, in cases of wanton conduct.[72] An attempt to contrast and separate compensatory and exemplary damages is largely academic to the jury, and an instruction that they may consider malice to "aggravate" one and not the other, is wholly so.[73]

In situations where evidence of defendant's malice is allowed in "aggravation," this is very often shown by proof of other derogatory statements made by the defendant regarding the plaintiff. By the prevailing present view these other expressions of the defendant's ill-will may properly be shown even though they are actionable in themselves, and even though uttered after the present action was filed, and it is immaterial that they deal wholly with matters unrelated to the defamation for which the action is now brought.[74] By analogy, it has long been customary, in cases where the defendant has pleaded in defense the truth of the allegel libel or slander, and has thus reiterated the original accusation, to instruct the jury that if the plea of truth is not sustained by the evidence, they may consider this fact in aggravation of damages.[75] The trend of later opinion seems in favor, however, of limiting this practice to cases where the jury may find that the plea of truth was itself wantonly or maliciously filed, as in cases where it appears that when it was entered the defendant knew that he would be unable to bring any

[72] *Supra* §6 of this note.

[73] See Davis v. Hearst, 160 Cal. 143, 166 P. 530, 546, 547 (24) (1911).

[74] Decisions collected and discussed: ANN. (1919) 12 A. L. R. 1026; DEC. & CURR. DIG., *Libel and Slander* §27. The English decisions are analyzed in BOWER, ACTIONABLE DEFAMATION (2d ed. 1923) 160 note, where the learned author properly derides the suggestion made in Pearson v. Lemaitre [*supra* note 69]—a suggestion frequently echoed in American opinions—to the effect that the jury while told they may consider other defamatory publications as evidence of malice to enhance damages, must be cautioned "against giving damages in respect of such other cause of action." This dictum, he says, is "quite unintelligible," and he quotes an earlier comment: "perhaps not many juries would be able, and still fewer would be inclined to act on any such caution."

If the other derogatory statement was absolutely privileged, the few cases are against its admission as evidence of malice—a result which to Wigmore "seems unsound." Lehner v. Berlin Pub. Co., 246 N. W. 579, 582, 585 (Wis. 1933) (three judges dissenting); 1 WIGMORE, EVIDENCE (2d ed. 1923) §494.

[75] Caffin v. Brown, 94 Md. 190, 50 Atl. 567 (6) (approving instruction that unsustained plea is evidence of malice and may be considered in aggravation); Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897 (1913) (unsustained plea may be considered in aggravation, and evidence that it was filed in good faith goes to mitigate exemplary damages). Cases collected: DEC. & CURR DIG., *Libel and Slander* §57; 36 C. J. 1237.

proof to support it.[76] This limitation seems a wise one, in view of the general policy which confers upon litigants and witnesses in judicial proceedings immunity[77] from liability for relevant statements made in pleadings or testimony.[78] Defendant, of course, can urge in "mitigation" any facts which negative ill-will or negligence, and which tend to show that he made the defamatory statement in good faith.[79] Consequently, he may prove that plaintiff's conduct had given apparent ground for making the charge.[80] He may show also that he, the defendant, made his accusation on the faith of statements made by third persons[81] and may even give evidence that the

[76] Webb v. Gray, 181 Ala. 408, 62 So. 194 (2) (1913) (slander *per se;* charge to effect that jury if they find plea of truth unsustained, may consider this in aggravation, erroneous, in view of Code (1907) §3746, permitting such plea); Fodor v. Fuchs, 79 N. J. Law, 529, 76 Atl. 1081 (1910) (jury may consider unsustained plea, made in good faith on reasonable grounds, in aggravation, only to extent of real injury); Walling v. Commercial Advertiser Ass'n, 173 App. Div. 491, 159 N. Y. S. 329 (1916) (under Code Civ. Prac. §§535, 536 permitting plea in mitigation, such plea reiterating libel may be considered on damages only if made in bad faith, which may appear from abandonment of plea at trial, and then only on exemplary damages); 2 SEDGWICK, DAMAGES (9th ed., 1912) §447; BOWER, ACTIONABLE DEFAMATION (2d ed., 1923) 160 note.

[77] Independent Life Ins. Co. v. Rodgers, 165 Tenn. 447, 55 S. W. (2d) 767 (1933); DEC. & CURR. DIG., *Libel and Slander* §38 (1).

[78] It has been suggested that in any event the unsustained plea should not be in itself a ground of damages, but that it should be considered only as evidence that the original publication was malicious. Pfister v. Milwaukee Free Press Co., 139 Wis. 627, 121 N. W. 938, 951 (22) (under Stat. (1898) §4201 providing that plea of truth, unsustained, shall not of itself be proof of malice, court correctly charged that jury might consider the plea as evidence of malice in the original statement, without requiring that plea itself should have been filed maliciously). This seems over-refined. Better abandon altogether the anomalous doctrine of considering the unsustained plea as aggravation. It heightens unduly the inherent risk of attempting to substantiate in court the truth of the defamatory charge. See (1929) 43 HAR. L. REV. 323.

[79] Massee v. Williams, 207 F. 222 (C. C. A. 6th, 1913) and cases collected: DEC. & CURR. DIG., *Libel and Slander* §§59, 62; 37 C. J. 121; BOWER, ACTIONABLE DEFAMATION (2d ed. 1923) 162. It has been held that defendant's intoxication may be shown as negativing deliberate malice. Alderson v. Kahle, 73 W. Va. 690, 80 S. E. 1109 (1916).

[80] Scripps v. Foster, 41 Mich. 742, 3 N. W. 216 (1879) (libelous article condemning method of vaccination used by plaintiff, a physician. Defendant permitted to show publication by plaintiff of article defending method); Gressman v. Morning Journal Ass'n, 197 N. Y. 474, 90 N. E. 1131, 1133 (1910) (libelous newspaper article charging that plaintiff, a nurse, had fallen in love with a patient, to her undoing, and that she was insane: *held,* that actions of plaintiff lending color to the charge may mitigate damage).

[81] Broadfoot v. Bird, 217 App. Div. 325, 216 N. Y. S. 670 (1926) (publication of newspaper article in reliance on assurance of its truth by third person); Gill v. Ruggles, 95 S. C. 90, 78 S. E. 536 (1913) (slander based on information given by others); Pfister v. Milwaukee Free Press Co., 139 Wis. 627 (1909) (fact that libelous article was copied from another newspaper and believed true). DEC. & CURR. DIG., *Libel and Slander,* §64. A small sprinkling of American decisions seem to restrict mitigation on this ground, to cases where the defamatory statement itself purported to be second-hand and based on

matters had already been the subject of common rumor, and that this was the source of his statement.[82] Obviously only matters known to the defendant when he published the defamation can shed light on his good faith in making the charge.[83] It "mitigates" malice also to show that it was pardonable, because prompted by provocation on plaintiff's part, as where the plaintiff by a prior verbal attack on defendant, stimulated defendant to answer in kind.[84] Again, an apology or retraction by defendant, not only may greatly diminish the injury to plaintiff's reputation,[85] but may have some bearing upon the original good faith of the publication.[86] Statutes sometimes provide that a newspaper which publishes a retraction of a libel shall not be held for exemplary damages.[87]

May the truth of the defamatory statement be shown in mitigation? The question at first blush seems futile, since we know that the truth is a complete defense. But the question does arise, in two

information received from others. De Severinus v. N. Y. Evening Journal Pub. Co, 150 App. Div. 342, 134 N. Y. S. 664 (1912); Berger v. Freeman Tribune Pub. Co., 132 Ia. 290, 109 N. W. 784 (1) (1906). In England, the informant must have been named in the defamatory statement. BOWER, ACTIONABLE DEFAMATION, 163 (2d ed., 1923).. A recent Florida case has gone further, and in respect to republishing by a newspaper of the dispatches of a national news service, has held that the publication was privileged. See note 9, *supra*.

[82] Darling v. Mansfield, 222 Mich. 278, 192 N. W. 595, 34 A. L. R. 595 (1923) (that defendant repeated common talk which he had heard and believed, receivable in refutation of malice). The fact that such rumors existed, and were known to defendant, cannot be used by him as a cloak for malice. It will not be received in mitigation unless the rumor was so widespread and general that it was reasonable for the defendant to believe it. Abell v. Cornwall Industrial Corp., 241 N. Y. 327, 150 N. E. 132, 43 A. L. R. 880, 887, ANN. 906 (1925).

[83] Goodrow v. Press Co., 233 App. Div. 41, 251 N. Y. S. 364 (5) (1931).

[84] McLeod v. American Pub. Co., 126 S. C. 363, 120 S. E. 70 (1923); DEC. & CURR. DIG., *Libel and Slander* §63. But the mere fact that the slanderous words were spoken in the heart of a quarrel to which plaintiff was a party, does not mitigate. It must be shown that the plaintiff brought on the quarrel. Rohr v. Riedel, 112 Kan. 130, 210 P. 644 (1922).

[85] Webb v. Call Pub. Co., 173 Wis. 45, 180 N. W. 263 (1920) (admissible on compensatory damages).

[86] Taylor v. Hearst, 107 Cal. 262, 40 P. 392 (2) (1895) (retraction goes in mitigation of compensatory damages); DEC. & CURR. DIG., *Libel and Slander* §66; 37 C. J. 123. A recent New York case, however, limits the effect of a retraction to the issue of malice, on exemplary damages,—a narrow view superinduced, perhaps, by the glaringly inadequate verdict in the particular case. Kehoe v. New York Tribune, 229 App. Div. 220, 241 N. Y. S. 676 (1930) (verdict for six cents for gross libel of attorney of excellent character).

[87] Instances are N. C. CONS. STATS. (1919) §§2429-31, construed and held constitutional in Pentuff v. Park, 194 N. C. 146, 138 S. E. 616 (1927); N. D. COMP. LAWS (1913) §9562, construed in Meyerle v. Pioneer Pub. Co., 45 N. D. 568, 178 N. W. 792 (1920); N. J. 2 COMP. STAT. (1910) P. 1815 §226, construed in Lindsey v. Evening Journal Ass'n, 163 Atl. 245 (9) (S. Ct., 1932). In Minnesota, if the libel was published in good faith, a retraction limits the plaintiff to special damages. GEN. STATS. 1923 §9397.

ways. In the first place, the truth at common law, to be available as a defense, had to be specially pleaded, and could not be shown under the general issue,[88] as could facts which go only in "mitigation."[89] If the defendant, through oversight or otherwise, had failed to plead truth in justification, could he offer evidence that his charge was true, in whole or in part, not as a defense but as evidence of his good faith, in "mitigation"? It is usually held, in the absence of statute, that he cannot.[90] In the second place, the defendant may plead truth, but may be able only to show that the charges aganst plaintiff were *partly* true. In such case, the fact of partial truth, though not a defense, may be considered, as bearing on good faith, in mitigation.[91]

In many of the states, following the lead of New York, it is now specially provided that the "defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages, and whether he prove the justification or not, he may give in evidence the mitigating circumstances."[92] This and other code provisions[93] are usually construed not merely to

[88] The truth had been allowed to be proven under the general issue, in mitigation, until the rule was changed by the case of Underwood v. Parks, 2 Strange 1200, 93 Eng. Reprint 1127 (King's Bench, 1743). See the interesting review of the history of the rule, by Epes, J., in Rosenberg v. Mason, 157 Va. 215, 160 S. E. 190, 195 (1931). See also Huson v. Dale, 19 Mich. 17, 2 Am. Rep. 66 (1869).

[89] Ogren v. Rockford Star Pub. Co., 288 Ill. 405, 123 N. E. 587 (1919).

[90] Pickford v. Talbott, 28 App. D. C. 498, 506 (1906) *aff'd* 211 U. S. 199, 29 Sup. Ct. 75, 53 L. ed. 146; Williams Printing Co. v. Saunders, 113 Va. 156, 73 S. E. 472, 476 (1913; DEC. & CURR. DIG., *Libel and Slander* §100 (3) (4). But if the evidence, although it may tend circumstantially to show the truth of the charge, is offered solely to prove that facts which were known to the defendant at the time of his statement, afforded him reasonable grounds to believe it, and hence to rebut malice, then it seems only fair to admit it. Many American courts modify the rule to that extent. A leading and instructive case is Huson v. Dale, 19 Mich. 17, 2 Am. Rep. 66 (1869). See 37 C. J. 63, §§435, 436; DEC. & CURR. DIG., *Libel and Slander* §100 (3) (4). The Alabama Civil Code §7356, goes back to the early common law rule (*supra* note 88) and provides that "the truth of the words spoken or written . . . may be given in evidence under the general issue in mitigation of the damage." It is held, under the statute, however, that, though the evidence is logically relevant on the issue of compensation as bearing on the plaintiff's mental suffering, it can come in only in mitigation of punitive damages. Starks v. Comer, 190 Ala. 245, 67 So. 440 (3) (1914).

[91] Clarke v. Taylor, 2 Bing. N. C. 654, 132 Eng. Reprint 252 (1836); BOWER, ACTIONABLE DEFAMATION (2d ed. 1923) 163.

[92] N. Y. CODE OF PROCEDURE (1848) as amended 1849. This has been widely copied, *e.g.*, in Oregon (Laws, §92); see Mount v. Welsh, 118 Ore. 568, 247 P. 815 (33) (1926). Corresponding sections in later New York Codes are: CODE OF CIVIL PROCEDURE (1876) §535 and Civil Practice Act (1920) §338.

[93] See especially N. Y. CIVIL PRACTICE ACT (1920) §262, 339 (CODE CIV. PROC. (1876) §§508, 536). The former section permits the defendant to plead a "partial defense," and the latter provides that "the defendant may prove, at

permit, contrary to the common law, but to require, that *all* facts which will be relied on by the defendant in mitigation of damage shall be pleaded by him in his plea or answer,[94] a requirement which may easily be overlooked by an incautious defendant.

Plaintiff's Bad Reputation. We have already seen that injury to reputation is an element of the "general damage" and that the plaintiff has the benefit of a presumption that his reputation before the publication was good.[95] In fairness, the defendant must be allowed to meet this issue, and to prove if he can, that, before the publication, the plaintiff's name and repute were already tarnished. It is true that such a one is all the more vulnerable to calumnies, as such stories are more likely to be believed about him, than about persons of good repute. Nevertheless, no fair assessment of the damage can be made without knowing the value of the reputation which is claimed to be hurt. Proof by the defendant of the plaintiff's bad repute, for this purpose, is commonly classed as evidence in "mitigation," but it is to be distinguished from the proof, heretofore considered, that the story published by defendant was already current in the community, and that his defamatory statement was based upon the current community belief.[96] Such evidence, so offered, bears on the question of the defendant's *malice,* and hence upon punitive damages, or indirectly on compensatory damages as indicating that the plaintiff's suffering is less than if the story were originated by defendant, out of spite.[97] The present evidence, on the other hand, goes directly to the principal element of compensatory damage, the previous value of the injured reputation.[98] In the form of opinion-evidence that plaintiff's general

the trial, facts not amounting to a total defense, tending to mitigate or otherwise reduce the plaintiff's damages, if they are set forth in the answer. . . ."

[94] Taylor v. Friedman, 214 App. Div. 198, 212 N. Y. S. 26 (4) (1925); see Brandt v. Story, 161 Ia. 451, 143 N. W. 545 (1913); Dickerson v. Dail, 159 N. C. 541, 75 S. E. 803 (1912); Pfister v. Milwaukee Free Press Co., 139 Wis. 627, 121 N. W. 938 (1909). But in other states the Code provisions are construed to permit, but not to require, mitigating facts to be pleaded. Marksberry v. Weir, 173 Ky. 316, S. W. 1108 (3) (1917); *cf.* Pouchan v. Godeau, 167 Cal. 692, 140 Pac. 952 (1914) (all mitigating facts may be proved without pleading—except those tending to show truth, which must be pleaded). Many states retain the common law practice under which matters in mitigation are not specially pleaded, but come in under the general issue. Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N. E. 587 (18) (1919). Cases collected: DEC. & CURR. DIG., *Libel and Slander* §§100 (4), 37 C. J. 62.

[95] *Supra* §4 of this note.

[96] *Supra* note 82.

[97] See Abell v. Cornwall Industrial Corporation, 241 N. Y. 327, 150 N. E. 132 (1925).

[98] See Sclar v. Resnick, 192 Ia. 669, 185 N. W. 273 (5) (1921) (the court points out the distinction between evidence of bad reputation offered in "mit-

reputation in the community for the trait involved in the defamatory charge, e.g. honesty, chastity, peaceableness, as the case may be—it is almost universally admitted.[99] Whether pre-existing common reports in the community that the matters charged against the plaintiff in the defamatory statement, are true, can come in for this purpose of showing a reputation already tainted, and hence to lessen compensatory damages, is a question on which the American courts are evenly divided.[100] One danger is that the jury may accept rumor for fact. Closely akin to this problem is the question whether other specific publications of the defamatory charge may come in to mitigate damage to reputation. This problem recurs with special frequency in cases of newspaper libel. The widespread broadcasting of the story through news services results in the publication, at about the same time, of the same libelous matter by numerous papers. Each journal is separately liable for its own publication, and it would seem fair to allow the defendant to apprise the jury that the plaintiff may have an opportunity to seek reimbursement from others who have participated in the wrong. The courts, however, have rejected this view, and have held that defendant is adequately protected by an instruction that the jury can assess damages only for the harm done by the defendant's publication.[101]

igation" of actual damages, and evidence in "mitigation" which tends to negative malicious motive).

[99] Snively v. Record Pub. Co., 185 Cal. 565, 198 Pac. 1 (1921) (libelous cartoon implying inefficiency of chief of police; defendant may show reputation of plaintiff for efficiency); Wood v. Custer, 86 Kan. 387, 121 Pac. 355 (1912); Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147 (1913); Scott v. Sampson, L. R. 8 Q. B. D. 491, 503 (1882). DEC. & CURR. DIG., *Libel and Slander* §§61, 110 (3); ANN. (1925) 43 A. L. R. 887, 890; 1 WIGMORE, EVIDENCE (2d ed. 1923) §73. About half the states confine the evidence to reputation in respect to the particular trait; the others admit also evidence of reputation for general character. WIGMORE, *ubi supra.*

Seemingly, even in those code states where matters in "mitigation" must be specially pleaded, this reputation evidence ought to come in under a mere denial. Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147 (2) (1913); Candrian v. Miller, 98 Wis. 164, 73 N. W. 1004, 1007 (1898); Bennett v. Matthews, 64 Barb. 410, 415 (N. Y. S. Ct. 1872). But see Ward v. Deane, 10 N. Y. S. 421 (S. Ct. 1890).

[100] See Morgan v. Lexington Herald Co., 138 Ky. 637, 128 S. W. 1064 (1910) (admitting); Abell v. Cornwall Industrial Corp., 241 N. Y. 327, 150 N. E. 132 (1925) (admissible only on issue of malice and exemplary damage). Cases pro and con collected: ANN. (1925) 43 A. L. R. 894, 898. The trend of recent English decisions seems against admission. Scott v. Sampson, L. R. 8 Q. B. D. 491, 503 (1882).

[101] Sun Printing & Pub. Co. v. Schenk, 98 Fed. 925 (1) (C. C. A. 2nd, 1900) (previous publication of same story by other papers, not pleadable in mitigation); Norfolk Post Corp. v. Wright, 140 Va. 735, 125 S. E. 656 (5) (1924) (simultaneous publication of local item by another local newspaper, excluded);

Perhaps the most difficult question which arises in this connection is how far the defendant is at liberty to prove on the issue of damages[102] particular incidents in the life of the plaintiff which are to his discredit. Conceivably they might be pertinent in two aspects. First, it would seem that misconduct of the plaintiff (before the defamation) which was *notorious,*[103] or the fact that the plaintiff has been convicted of crime, would shed a glaring light on his reputation. Second, the plaintiff's acts of misconduct may be such as to show a lack of sensitiveness in respect to the subject of the defamation. On this last principle it is held in New York that where the defamatory statement charges lewd conduct, other acts of unchastity of which plaintiff has been guilty, may be shown.[104] And where a husband, who was a clergyman, sued for a false charge of adultery, evidence

Bragg v. Hammack, 155 Va. 419, 155 S. E. 683 (2) (1930) (previous disclosure by others of contents of libelous letter written by third person, and circulated by defendant, excluded, though it appeared that previous disclosures had started widely current rumors); DEC. & CURR. DIG., *Libel and Slander* §111; 37 C. J. 93. Nor do the decisions permit the defendant to show that the plaintiff has brought suit against other circulators of the story or even has secured judgment. Butler v. Hoboken Printing & Pub. Co., 73 N. J. L. 45, 62 Atl. 272 (S. Ct. 1905) (Annie Oakley, the lady rifle shot, of Buffalo Bill's show, sues Hoboken, N. J., newspaper for story of her arrest in Chicago; the same item was sent out from Chicago, and was published in a number of newspapers; *held,* evidence of the particulars of actions against other newspapers, and amounts of damages recovered, properly excluded); Palmer v. Matthews, 162 N. Y. 100, 56 N. E. 501 (1900); Fay v. Brockway Co., 176 App. Div. 255, 162 N. Y. S. 1030 (1917). This last has been changed by statute, in some jurisdictions, so far as to permit newspapers to show that other actions have been brought and recoveries or settlements made. LAW OF LIBEL AMENDMENT ACT (1888) 51 & 52 VICT. C. 64 §6; NEW YORK PRACTICE ACT §338a (1924).

[102] On issues other than damages the plaintiff's past misconduct may frequently be shown, and this will often have a glancing effect on damages. Thus, if the defamatory charge assails plaintiff generally in respect to some character-trait, *e.g.* as a "thief," or as an "unfit judge," and the defendant pleads truth, then plaintiff's character in this respect and not his reputation is directly in issue, and his acts bearing on the character-trait in question come in. Moore v. Davis, 27 S. W. (2d) 153 (3) (Tex. Comm. App., 1930); DEC. & CURR. DIG., *Libel and Slander* §110 (1). Again, if the plaintiff takes the stand, he may within the limits imposed by the trial judge's discretion, be cross-examined as to unsavory incidents in his life-history, to discredit him as a witness. A picturesque recent case illustrating this is Hobbs v. Tinling & Co., Ltd., L. R. [1929] 2 K. B. 1 (cross-examination of plaintiff, a convicted blackmailer, as to his past history, could be considered only to discredit him as witness, and jury should have been instructed against considering it in mitigation of damages).

[103] *Cf.* Gressman v. Morning Journal Ass'n, 197 N. Y. 474, 90 N. E. 1131, 1133 (1910) (notorious acts of plaintiff, exciting public comment, may mitigate compensatory damage, as lessening value of reputation).

[104] Smith v. Matthews, 47 N. Y. S. 96 (S. Ct., 1897) (libel charging married woman with having eloped; verdict for plaintiff; new trial granted on newly discovered evidence of amours of plaintiff with same man at other times); see Osterheld v. Star Co., 146 App. Div. 388, 131 N. Y. S. 247, 251 (1911). But see *infra* note 106.

of his brutal and inhumane treatment of his wife was admitted on this basis.[105] But even a man with an evil history is entitled to protection against false charges,—indeed he may need such protection more than one of unsullied name—and the courts are disinclined, when he seeks redress, to subject him to exposure of all his past sins. Such an *Exposé* would be likely to cause the jury to decide the case on false issues, and would often be unduly time-consuming. Consequently, the doctrine is generally accepted that on the issue of damages, the plaintiff's record of particular misdoings is not open to proof by the defendant.[106]

(8) *The Amount of the Award.*

Apart from the occasional traceable money-loss recovered as special damage, damages in defamation cases are measurable by no standard which different men can use with like results.[107] Amounts of verdicts vary from nominal damages of a few cents, to a fortune in six figures, according to numberless factors, such as the age, sex, wealth, and personal attractiveness of the parties, the skill of the respective counsel, the pungency of the defaming words, and the infinite variety of the experiences, sympathies and prejudices of the jurymen. A classic illustration of the vagaries of jurors is afforded by the early English case of *Lord Townshead v. Hughes.*[108] For making the mild statement that the plaintiff was "an unworthy man who acts against law and justice," the jury assessed damages against defendant in the sum of £4000. It appears from the report that one

[105] Osterheld v. Star Co., *supra* note 104.

[106] Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897, ANN. C. 1914D 1056 (defamatory statements reflecting on plaintiff's chastity; evidence of specific improper acts of plaintiff inadmissible in mitigation); Scott v. Sampson, L. R. 8 Q. B. D. 491, 505 ("At the most it tends to prove not that the plaintiff has not, but that he ought not to have, a good reputation. . . ."); Hobbs v. Tinling & Co., Ltd., L. R. [1929] 2 K. B. 1; 1 WIGMORE, EVIDENCE (2d ed. 1923) §209; 37 C. J. 76.

[107] At an early period in Germanic law, the *wer,* or money-payment of fixed amount, was payable for insulting words, as it was for wounds to the flesh. By the Salic law, one who calls a man a "wolf" or a "hare," must pay three shillings; if he falsely imputes unchastity to a woman, he pays forty-five shillings. LEX SALICA, tit. 30, cited in Veeder, *History of the Laws of Defamation,* 3 SELECT ESSAYS, ANGLO-AM. LEGAL HISTORY (1909) 448. In a recent article, the authors suggest, semi-seriously, that a tariff of money-payments for different defamatory expressions be fixed and administered like Workmen's Compensation. Ernst and Lindey, *What Price Reputation?* (1933) 19 A. B. A. J. 103. Only one actual money limit by statute has been encountered [OKLA. COMP. STAT. ANN. (Bunn, 1921) §500]. This provides that any verdict and judgment for plaintiff in libel and slander shall be for not less than $100 and costs.

[108] 2 Mod. 150, 86 Eng. Rep. 994 (1677).

of the jurors confessed "that they gave such great damages to the plaintiff (not that he was damnified so much) but that he might have the greater opportunity to show himself noble in the remitting of them."

The control of the jury's action in respect to amount, exercised by the judges, trial and appellate, is obviously very real and constant in checking extreme results, despite the absence of a tangible standard, under the formula that, while the amount is largely in the jury's discretion, it may be set aside if it appears to be the result of passion or prejudice.[109]

As illustrating the actual working-out of the theories of damages in defamation cases, in terms of amount, the following table[110] of awards, with the dispositions made by the appellate courts, in the United States, Canada, and England, during the years 1928-1932, is appended:

[109] Sandora v. Times Co., 113 Conn. 574, 155 Atl. 819 (4) (1931); Yates v. Mullins, 233 Ky. 781, 26 S. W. (2d) 757 (11) (1930). The jury's lee-way is even wider in respect to exemplary, than in compensatory, awards. Scott v. Times-Mirror Co., 181 Cal. 345, 184 Pac. 672 (1919). See DEC. & CURR. DIG., *Libel and Slander* §123 (9), (10).

[110] Ths compilation was prepared by Mr. O. C. Knudsen, of the Chicago Bar.

Plaintiff	Words Spoken	Defendant	Amount Given By the Jury	Amount Given By the Court
Minor	Theft and perjury	?	$500.00	Same. [111]
Blind man	Letter accused P. of dishonest and crooked dealing.	Bank, by manager. Read by P.'s wife only.	$4000.00	Same. [112]
Chauffeur	Discharged for drinking.	Employer Taxi Co.	$600.00	Same. [113]
Teacher (woman)	Immoral acts constituting a crime	?	$4750.00	Excessive by $2750.00 [114]
Lion Oil Co.	Almost a bankrupt	Sinclair Ref. Co.	$100,000.00	Same. [115]
Murder suspect	Charged with murder and robbery both.	Newspaper	$1100.00	Same. [116]
Wealthy man	Pro-German (1921)	Newspaper	$100,000.00 $100,000.00	Same. [117] Excessive by $75,000
?	Charged a felony.	?	$500	Same. [118]
?	D. said he was father of married woman's child.	?	$1100.00	Excessive by $500.00 [119]
Foreman of Rd. crew fired	"Stealing"	Rd., by agent	$7500.00	Excessive by $3750.00 [120]
Attorney	"Convicted in Milk Graft".	Newspaper	6 cents.	Inadequate. Rev. [121]
Lawyer, candidate for office	Conspired with K.K.K. to suppress Polish votes.	Newspaper	$5000 property damages, $10,000 injured feelings	Same. [122]
?	Libel per se	?	$5000 pun., no actual	Same. [123]
?	Imputed unchaste.	?	$30,000	Same. [124]
?	Liar, thief, and swindler.	?	Jury said $600 pun., but judge wouldn't give	Upper ct. gave $1.00 and costs. [125]
Editor	Sued for dam. in newspaper circulation contest.	Newspaper	$2500	Same. [126]
?	Cut timber knowing that he was trespassing	?	$75	Same. [127]
Young married woman	Unchaste (to her mother only publ.)	?	$500	Same. [128]
?	Liar, thief, highway robber	?	$1.00 nom. $500 pun. No actual dam.	Same. [129] Not allowed.

Plaintiff	Words Spoken	Defendant	Amount Given By the Jury	Amount Given By the Court	
Employee	Throwing dice on company time.	Ry., by agent	$2500	Same.	130
Married woman	Obtaining goods by false pretenses.	Montgomery Ward & Co.	$4923.91	Same.	131
Employee	Stealing.	Employer by manager.	$3000	Same.	132
Uncle and niece	Incest, adultery, illeg. children	Newspaper	$3000 to uncle $4000 to niece	Same.	133
?	Criminal	Credit Bureau	$3500	Same.	134
Woman	Harbored stolen chickens	Farmer victim	$400	Rev. no actual malice.	135
?	Theft of airship	?	$2000	Same.	136
Woman	"G_____damn dirty whore."	?	$1000	Same.	137
Workman	Ordered out of rescaurant"You're too dirty"	Restaurant	Nothing	Nothing.	138
Minor girl cashier	Innuendo against her credit	Theater owner	$1500	Same.	139
Author	Innuendo P. in Dieppe doing things he hadn't dared to do at home	Newspaper	$1500	Same.	140
Wife	M. C. and Miss X. reported engaged. M. C. married to P.	Newspaper	$500	Same.	141
?	Subordination of perjury	?	£40	Same.	142
?	Dishonest	?	1¾d.	Same.	143
Newspaper	Hypocritical in policy of running paper	Newspaper	$6000	Same.	144
Farmer	"You can go home now .... there are no pigs to steal here."	Farmer	$100	Appeal allowed and action dismissed.	145
Woman	Cohabits with stepson	Woman	$100	Same.	146
Physician	Lost 2 children through P's drunkenness	?	$1.00 nom.	Same.	147
Waitress	"Diseased"	Employer	$500	Same.	148
?	Arson	?	$300	Same.	149

Plaintiff	Words Spoken	Defendant	Amount Given By the Jury	Amount Given By the Court
Murder suspect	"Royal Northwest Mounted got man after 7 years." Implied guilt	Newspaper	$1000	Same. [180]
?	"Dirty bitch"	?	$25,000	$15,000. [181]
Attorney	Associating with notorious violator of law	Newspaper	$10,000	Nothing. [182]

[111] Landrum v. Ellington, 152 Miss. 569, 120 So. 444 (1929).
[112] Lane v. Schilling, 130 Ore. 119, 279 Pac. 267 (1929).
[113] Louisville Taxicab & Transfer Co. v. Ingle, 229 Ky. 578, 17 S. W. (2) 709 (1929).
[114] Hewett v. Samuels, 46 Idaho 792, 272 P. 703 (1929).
[115] Lion Oil Co. v. Sinclair Ref. Co., 252 Ill. App. 92 (1929).
[116] James v. Powell, 154 Va. 96, 152 S. E. 539 (1930).
[117] Seested v. Post Printing & Publ. Co., 326 Mo. 559, 315 S. W. (2d) 1045 (1930).
[118] Yates v. Mullins, 233 Ky. 781, 26 S. W. (2) 757 (1930).
[119] Bochenck v. Nilewski, 252 Mich. 575, 233 N. W. 420 (1930).
[120] New Orleans Great Northern R. Co. v. Frazer, 158 Miss. 407, 130 So. 493 (1930).
[121] Kekoe v. New York Tribune, Inc., 229 App. Div. 220; 241 N. Y. S. 676 (1930).
[122] Poleski v. Polish American Pub. Co., (1931) 254 Mich. 15, 235 N. W. 841 (1931).
[123] Clark v. McClurg, 295 Pa. 1038 (Col App., 1931).
[124] Ballard v. Krug, 111 Col. App. 415, 295 Pac. 871 (1931).
[125] Flournoy v. Story, 37 S. W. (2) 262 (Tex. Civ. App. 1930).
[126] Southern Publ. Co. v. Foster, 36 S. W. (2) 231 (Tex. Civ. App., 1931).
[127] Pelletier v. Pugh, 16 La. App. 693, 132 So. 769 (1931).
[128] Bache v. Stoltz, 16 La. App. 524, 134 So. 112 (1931).
[129] Anderson v. Alcus, 42 S. W. (2) 294 (Tex. Civ. App., 1931).
[130] Texas & N. O. R. Co. v. Tolbert, 46 S. W. (2) 361 (Tex. Civ. App., 1932).
[131] Turner v. Montgomery Ward & Co., 165 S. C. 253, 163 S. E. 796 (1932).
[132] Snyder et al. v. Fatherly, 163 S. E. 358. 158 Va. 335, 163 S. E. 358 (1932).
[133] Sandora v. Times Co., 113 Conn. 574, 155 Atl. 819 (1932).
[134] Hanschke v. Merchant's Credit Bureau, 256 Mich. 272, 239 N. W. 318 (1931).
[135] Bond v. Lotz, 214 La. 683, 243 N. W. 586 (1932).
[136] Weatherford v. Birchett, 158 Va. 741, 164 S. E. 535 (1932).
[137] Simons v. Harris, 245 N. W. 875 (La. 1932).
[138] Larson v. R. B. Wrigley Co., 183 Minn. 28, 235 N. W. 393 (1931).
[139] Norman v. Stevenson Theatres, 159 S. C. 191, 156 S. E. 357 (1931).
[140] Jones v. Hulton (E) & Co., [1909] 2 K. B. 444, 78 LJKB 937.
[141] Cassidy v. Daily Mirror Newspapers, [1929] 2 K. B. 331.
[142] Tripp v. Thomas, 107 Eng. Rep. 792 (1824).
[143] Martin v. Benson, [1927] 1 K. B. 771.
[144] Sentinel-Review Co. v. Robinson, 61 O. L. R. 62 (1927) see [1928] S. C. R. 258.
[145] Dubord v. Lambert, [1928] 2 W. W. R. 529 (Alberta).
[146] Paliuk v. Masoruk and Masoruk, [1931] 3 W. W. R. 380 (Saskatchewan).
[147] McCullough v. Robinson, [1930] 3. W. W. R. 534.
[148] Nagy v. Webb, [1930] 1 W. W. R. 357 (Sask.).
[149] Mercereau v. Hock, [1930] 1 W. W. R. 821 (Sask.).
[150] Pat v. Illinois Printing & Pub. Co., [1929] 2 W. W. R. 14 (Sask.).
[151] Meyers v. Berg, 212 Col. 415, 298 Pac. 806 (1931).
[152] Okla. Publ. Co. v. Gray, 138 Okl. 71, 280 Pac. 419 (1929).